IN THE

Supreme Court of the United States.

DANIEL R. KENDALL,
Appellant,

AGAINST

THE AMERICAN AUTOMATIC LOOM COMPANY,
Appellee.

October Term, 1904. No. 541.

BRIEF IN OPPOSITION TO APPELLANT'S MOTION TO ADVANCE THIS CASE UNDER RULE 32.

Statement of the Case.

The complainant is a citizen of the State of New York. The defendant, a corporation, is a citizen of the State of West Virginia. The writ of subpœna and bill of complaint were served in the Southern District of New York on the defendant's treasurer. The defendant, appearing specially for that purpose, thereupon moved the Court to set aside the service on the ground that the defendant was a corporation organized under the laws of West Virginia; that it was not engaged in business, and had no property, in the State of New York; that its treasurer, on whom process had been served, was not in that State officially or as representing any business or interest of the corporation;

and that the defendant under these circumstances had not been brought into court by any legal service. The motion was granted on the authority of Conley vs. Mathieson Alkali Works, 190 U. S., 406; Geer vs. Mathieson Alkali Works, 190 U. S., 429; Goldey vs. Morning News, 156 U. S., 518; Fitzgerald Construction Co, vs. Fitzgerald, 137 U. S., 106; Wabash Western Ry., vs. Brow, 164 U. S., 271; *In re* Keasby, 160 U. S, 221; St. Clair vs. Cox, 106 U. S., 350, and kindred cases. The complainant thereupon prayed an appeal to this Court. The appeal was taken, as it is claimed, under the authority of Section 5 of the Act of March 3, 1891, which provides:

> "That appeals or writs of error may be taken from the district courts or from the existing circuit courts direct to the Supreme Court in the following cases:
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> "In any case in which the jurisdiction of the court is in issue; in such cases the question of jurisdiction alone shall be certified to the Supreme Court from the court below for decision."

No certificate of any question of jurisdiction is contained in the record.

The appellant now moves to prefer the case under the 32d rule of this court to the effect that

> "cases brought to this court by writ of error or appeal, under the act of February 25, 1889, c. 236, or under section 5 of the act of March 3, 1891, c. 517, *where the only question in issue is the question of the jurisdiction of the court below*, will be advanced on motion, and heard under the rules prescribed by rule 6, in regard to motions to dismiss writs of errors and appeals.

The appellee opposes the motion on the ground that the appeal does not involve a "question of the jurisdiction of the court below," within the meaning of the statute or the rule.

ARGUMENT.

I.

THE QUESTION IN ISSUE IS NOT A QUESTION OF THE JURISDICTION OF THE COURT BELOW WITHIN THE MEANING OF SECTION 5 OF THE ACT OF MARCH 3, 1891, OR WITHIN THE MEANING OF THE 32D RULE OF THIS COURT.

This Court has had occasion in very recent cases to consider the meaning of the statute which allows a direct appeal from the Circuit Court where the jurisdiction of that Court is in issue. It is now settled that the question must affect the jurisdiction of the Circuit Court as a Court of the United States, and not in respect of its general authority as a judicial tribunal. If jurisdiction is challenged, not on grounds peculiar to the power of a Federal Court as such, but on grounds applicable with equal force to any tribunal that renders judgment only after notice and a trial, then there is no question of the jurisdiction of the Circuit Court within the meaning of the statute.

In Courtney vs. Pradt, decided by this Court on January 5, 1905 (Opinions of U. S. Supreme Court, Lawyers' Co-op. Pub. Co., No. 5, Feb. 1, 1905, p. 208), the question was whether an action could be maintained against a foreign executor. The Circuit Court held that it had no jurisdiction of such an action, and dismissed it. On appeal to this Court, the decision was that the jurisdiction of the Court below had been challenged, not in respect of its authority as a Federal Court, but only in respect of its general authority as a judicial tribunal, and hence that the appeal must be dismissed.

The Court, speaking by the Chief Justice, said :

> " The appeal was taken directly to this court, and cannot be maintained unless the case comes within the first of the classes named in section 5 of the judiciary act of March 3, 1891, which gives an appeal or writ of error direct, ' in any case in

which the jurisdiction of the court is in issue; in such cases the question of jurisdiction alone shall be certified to the Supreme Court from the court below for decision' (26 Stat. at L. 827, chap. 517, U. S. Comp. Stat., 1901, p. 5491).

"It is settled that the question of jurisdiction thus to be certified is the jurisdiction of the Circuit court *as a court of the United States, and not in respect of its general authority as a judicial tribunal* (Blythe vs. Hinckley, 173 U. S., 501; Mexican C. R. Co. vs. Eckman, 187 U. S., 429; Louisville Trust Co. vs. Knott, 191 U. S., 225; Bache vs. Hunt, 193 U. S., 523).

"And the general rule is that the certificate is an absolute prerequisite to the exercise of jurisdiction here (Maynard vs. Hecht, 151 U. S., 324). Although we have recognized exceptions to this rule when the explicit terms of the decree, or even of the order allowing the appeal, might properly be considered as the equivalent to the formal certificate (Huntington vs. Laidley, 176 U. S., 668; Arkansas vs. Schlierholz, 179 U. S., 598).

"But as said by Mr. Justice GRAY, in Huntington vs. Laidley, 'the record must distinctly and unequivocally show that the court below sends up for consideration a single and definite question of jurisdiction;' that is, of the jurisdiction of the court as a court of the United States.

"No such state of case is exhibited by this record. There is no certificate nor any equivalent therefor. No single and definite issue as to the jurisdiction of the Circuit court as a Federal court is presented.

"The case was dismissed for want of jurisdiction over it, as a suit against a foreign executor, in the courts of Kentucky. The court had power to so adjudicate. When a case has been removed into the Circuit court on the ground of diversity of citizenship, that court is entitled to pass on all questions arising, including the question of jurisdiction over the subject-matter in the state courts; *or the sufficiency of the service of mesne process to authorize the recovery of personal judgment* (Goldey vs. Morning News, 156 U. S., Wabash vs. Western R. Co., vs. Brow, 164 U. S., 271; De Lima vs. Bidwell,

182 U. S., 1; Conley vs. Mathieson Alkali Works, 190 U. S., 406). It is true that in this case a motion to remand was made, but there was nothing to indicate that it rested on the contention *that there was a lack of jurisdiction in the Federal courts as contradistinguished from the state courts.* It did not in terms put in issue the power of the circuit court as a court of the United States to hear and determine the case, and we cannot be called on to say that there may not have been other grounds for the motion, or to attempt to eliminate every other ground for the purpose of bringing the case within the first clause of section 5. * * *

"In our opinion the appeal was improvidently prosecuted directly to this court, and it must, therefore, be dismissed."

The conclusion reached in that case was supported, it will be observed, by reference to the very cases on which the decision in the case at bar was based (Goldey vs. Morning News; Wabash Ry. Co. vs. Brow; Conley vs. Mathieson Alkali Works). The refusal to assume jurisdiction on the ground that the service of process was insufficient to authorize the recovery of personal judgment, was instanced as affecting the general authority of a judicial tribunal, and not the authority of a Federal Court as such.

In Bache vs. Hunt, 193 U. S., 523, Hunt, as Receiver, filed his petition in the Circuit Court in the foreclosure suit of the Continental Trust Co. of New York vs. The Toledo, St. Louis and Kansas City R. R. Co., Jules Bache and others, asserting that he was entitled, out of certain of the first mortgage bonds foreclosed in the suit, to be reimbursed for amounts paid by him as Receiver in the extinguishment of prior claims which the bonds had been deposited to secure. Bache appeared specially and filed a plea to the jurisdiction of the Court over the subject matter because of the pendency in the Supreme Court of New York of a suit instituted prior to the filing of Hunt's petition by Bache as a judgment creditor, against the Toledo, St. Louis and Kansas City R. R. Co., and the Farmers'

Loan and Trust Co., in which the last-mentioned Company had been appointed Receiver of the securities forming the subject of Hunt's petition on the same day on which the Hunt petition was filed; and of his person because of the insufficiency of the method of service of the order. The plea was overruled. From the decree of the Circuit Court an appeal was taken to this Court, where the appeal was dismissed.

Speaking by the Chief Justice, the Court said:

> "It will be perceived that the jurisdiction of the Circuit Court was only questioned in respect of its general authority as a judicial tribunal and not in respect of its power as a court of the United States. The established rules of practice as to the bringing in parties to ancillary or *pro interesse suo* proceedings, and those governing courts of concurrent jurisdiction as between themselves, were alone involved. It is settled that the question of jurisdiction which the act of March 3, 1891, provides may be certified to this court directly, must be one involving the jurisdiction of the Circuit Court as a Federal court (Louisville Trust Company vs. Knott, 191 U. S., 225; Blythe vs. Hinckley, 173 U. S., 501).
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> "Tested by this rule, our jurisdiction fails, and the appeal must be dismissed."

In Louisville Trust Co. vs. Knott, 191 U. S., 225, 232, the Court said:

> "The question presented by the certificate of the Circuit Court is not one of *jurisdiction*, within the meaning of the fifth section of the act of 1891, and the jurisdiction of that court was not 'in issue.' There was diversity in the citizenship of the parties to this suit, instituted by Stuart R. Knott as a citizen of Missouri, and no question was raised, or could have been raised, as to the authority of the Circuit Court, as a Federal court, to take cognizance of it. * * *
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> "The question of jurisdiction which the statute permits to be certified to this court directly must be one involving the jurisdiction of the Circuit Court as a Federal court, and not simply its gen-

eral authority as a judicial tribunal to proceed in harmony with established rules of practice governing courts of concurrent jurisdiction as between each other."

See also:

Blythe vs. Hinckley, 173 U. S., 501.
Mexican C. R. Co. vs. Eckman, 187 U. S., 429.

The rule laid down in these decisions is applicable here.

The question that the Circuit Court decided is not one as to the jurisdiction of the Federal judiciary. That the suit is cognizable in the Circuit Court of the United States for the Southern District of New York has neither been disputed by the appellee nor denied by the Court below. The complainant is a citizen of the State of New York, and a resident of the Southern District of New York; the defendant is a citizen of the State of West Virginia (Shaw vs. Quincy Mining Co., 145 U. S. 444). Indisputably, therefore, there exists that diversity of citizenship which confers jurisdiction of the cause on the Federal Courts. The trouble is that the defendant has not been served with process. An attempt has been made to bring it into court by service of the subpœna on an agent, and the sole question is whether that service was effective. In passing on that question, the Court has been governed, not by any consideration peculiar to the jurisdiction of the Circuit Courts, but by considerations of general jurisprudence, applicable, as this Court has declared, to all tribunals. The very point of the decision is that a judgment recovered against a corporation through service of process on an agent in a State where it is not incorporated and not engaged in business, violates the fundamental rule that a court of justice cannot acquire jurisdiction over the person of another who has no residence within its territorial jurisdiction, except by actual service of notice within the jurisdiction upon him, or upon some one authorized to accept service in

his behalf (Goldey vs. Morning News, *supra*). This Court, in Goldey vs. The Morning News, 156 U. S., 518, 521, referred to that rule as "an elementary principle of jurisprudence." It held that the rule bound State and Federal Courts alike; and that to permit the recovery of a judgment in violation of its requirements was to impair the constitutional guaranty to the citizen of due process of law. Whether the facts set forth in this record brought the case within the ruling in the Goldey case, and in the cases to the same effect, is a question which the Circuit Court had the right to determine and did determine as an incident to its conceded jurisdiction of the subject matter of the suit. It held that the attempted service was void. In doing this, it did not challenge its jurisdiction as a Federal Court; but it enforced the general rule of jurisprudence, applicable to it in common with all tribunals, that jurisdiction must be exercised on notice to the defendant; and that service of notice on a person who is not the defendant nor authorized to represent the defendant, must be condemned as void.

It may be urged by the appellant that in Conley vs. Mathieson Alkali Works, 190 U. S., 406, where a similar question as to the sufficiency of service was involved, an appeal was taken directly to this Court, and decided on its merits. A sufficient answer is that no question as to the jurisdiction of this Court to entertain the appeal was either considered by the Court or suggested by counsel.

As was said in Louisville Trust Co. vs. Knott, 191 U. S., 225:

> "This Court need not consider itself bound as to a question of jurisdiction because it may have exercised jurisdiction in a case where the question might have been raised, but passed *sub silentio*."

To the same effect, see

New vs. Oklahoma, 195 U. S., 252, 256.
U. S. vs. More, 3 Cranch, 159, 172.

There is nothing inconsistent with the appellee's contention in Galveston Ry. Co. vs. Gonzales, 151 U. S., 497. The question there at issue affected the jurisdiction of the Federal Court *as such*. The question was whether the suit had been brought in violation of Section 1 of the Act of August 13, 1888, which fixed the place of trial as the district of the residence of either the plaintiff or the defendant. The jurisdiction, therefore, was challenged, not on grounds affecting equally all judicial tribunals, but on grounds specially affecting the Federal Courts. There the question was: Had the plaintiff a right to litigate his grievance in that Court at all, whether the defendant was or was not served within its territorial limits? Here no question is raised as to the complainant's right to proceed in the Court which he has selected; the sole question is one of fact, has he served the defendant? In the one case, there was a question of the power of the Circuit Court as such. In the other, there is a question of its general power as a judicial tribunal.

In Mexican Cent. Ry. Co. vs. Pinkney, 149 U. S., 194, no objection, it would seem, was raised as to the right of the court to entertain the appeal. Louisville Trust Co. vs. Knott and New vs. Oklahoma, *supra*, are, therefore, applicable. But in any event the question there was whether a state statute could give to a special appearance the effect of a general appearance so as to enlarge the jurisdiction of the Circuit Court. That was a question affecting the power of the Federal Court as such.

The fact that this Court entertained jurisdiction in Goldey vs. Morning News, *supra*, is without significance. That case was decided in the Circuit Court in 1890, before the passage of the Act of 1891. It has no bearing, therefore, on the power of this Court to entertain an appeal under existing statutes.

On the other hand, in Wabash Ry. Co. vs. Brow, 164 U. S., 271, where a like question as to the validity of service on the agent of a corporation was involved, the

appeal was carried in the first instance to the Circuit Court of Appeals, and reviewed in this Court through writ of *certiorari*.

It is submitted, therefore, that no controlling decision stands opposed to the appellee's contention, and that the contention should prevail.

The Circuit Court has certified no question for review. It has not disputed its jurisdiction of the subject matter of the cause. It has not suggested that the *parties*, if properly brought before it, are beyond its competence, or are rendered immune from prosecution in the circuit courts. It has merely held that the defendant has not yet been served with process. That is not a question of jurisdiction within the meaning of the statute. Suppose that the question had been one of the identity of the person served, and that the Circuit Court on the ground that there had been a mistake of identity, had set aside the service. Would any one claim that its order would involve a question of jurisdiction? With as little reason, can such a claim be made in this case. The jurisdiction of the Court below as a court of the United States, both over the subject matter of the cause and over the person of the defendant, when the defendant shall be served with process, is unchallenged. There is, therefore, no warrant for an appeal directly to this Court.

II.

THE MOTION SHOULD BE DENIED.

Respectfully submitted,
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Of Counsel for Appellee.

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